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Federal Trade Commission

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Jose Division

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SWISH MARKETING, INC., a
corporation,

MARK BENNING, individually and as an
officer of SWISH MARKETING, INC.,

MATTHEW PATTERSON, individually
and as an officer of SWISH
MARKETING, INC., and

JASON STROBER, individually and as
an officer of SWISH MARKETING,
INC.,

Defendants.

Case No. C09-03814 RS

Hearing Date: TBD
Hearing Time: TBD
Courtroom: 4, 5th Floor

**STIPULATED MOTION TO
REVISE INITIAL SCHEDULE;
DECLARATION OF BRIAN M.
GROSSMAN IN SUPPORT**

I. INTRODUCTION

On November 23, 2009, pursuant to a joint motion to revise the initial schedule for this matter, the Court entered an order (Dkt. #27), which, among other things, set (1) January 21, 2010, as the last day to meet and confer regarding initial disclosures, early settlement, and a discovery plan; (2) February 4, 2010 as the last day to file the Rule 26(f) Report, complete initial disclosures or state objection in Rule 26(f) Report, and to file a Case Management Statement; and (3) February 10, 2010 as the date for the Initial Case Management Conference. Since the Court entered that order, Defendants Swish Marketing Inc., LLC, Matthew Patterson, and Jason Strober have moved to strike certain portions of the Federal Trade Commission's ("FTC" or "Commission") Complaint (Dkt. #34), and Defendant Mark Benning has moved to have the Complaint dismissed (Dkt. #41). The Court in turn has entered an order (Dkt. #46), which sets February 10, 2010, as the date on which it will hear argument on these motions, and sets March 31, 2010, as the new date for the Initial Case Management Conference.

Accordingly, the current deadlines to meet and confer regarding initial disclosures and discovery and to complete initial disclosures and to file a Case Management Statement will take place before the Court makes a determination regarding the defendants' pending motions and before the defendants have filed their answers to the Complaint. The parties believe that it will be difficult to comply with these initial deadlines before learning how the Court will rule on the defendants' motions and before the defendants submit their answers to the Complaint. Thus, the parties respectfully request that these initial deadlines be extended, to be in line with the Initial Case Management Conference set for March 31, 2010. The proposed schedule is set forth below.

II. PROCEDURAL HISTORY

The FTC filed the Complaint (Dkt. #1) in this matter on August 19, 2009. On the same day, the Court issued its Order Setting Initial Case Management Conference and ADR Deadlines (Dkt. #4), which set November 25, 2009, as the deadline for the parties to meet

1 and confer about initial disclosures, early settlement, and a discovery plan, and to reach an
2 agreement regarding ADR; December 9, 2009, as the deadline for the parties to file the Rule
3 26(f) Report, complete initial disclosures, and file a Case Management Statement; and
4 December 16, 2009, as the date for the Initial Case Management Conference.

5 Defendants' initial deadline to respond to the Complaint was October 19, 2009. On
6 October 8, 2009, the parties agreed to extend that deadline until November 19, 2009. (Dkt.
7 #17.) On November 4, 2009, Defendants filed a Motion to Enlarge Time to Respond to the
8 Complaint [L.R. 6-1(B) and 6-3] (Dkt. #19), which the FTC opposed (Dkt. #20).
9 Defendants' motion sought to enlarge the deadline for responding to the FTC Complaint until
10 three weeks after the D.C. District Court ruled on a pending motion filed by the FTC to
11 dismiss an action for declaratory relief that certain defendants had filed in that court against
12 the FTC.

13 The week of November 9, 2009, the Court issued two orders (Dkt. #22, 24) in which
14 it temporarily postponed the deadlines set forth in the August 19, 2009, Order Setting Initial
15 Case Management Conference and ADR Deadlines, except for those related to ADR, and the
16 deadline to respond to the Complaint; set a schedule for further briefing on whether this
17 action should be delayed pending developments in the D.C. Action; and scheduled a hearing
18 date of December 16, 2009. On November 17, 2009, the D.C. District Court dismissed the
19 D.C. Action. Pursuant to a joint motion of the parties (Dkt. #25), on November 23, 2009, the
20 Court entered an Order Setting Initial Schedule (Dkt. #27), which among other deadlines, set
21 January 21, 2010, as the last day to meet and confer regarding initial disclosures, early
22 settlement, and discovery plan, and February 4, 2010, as the last day to file the Rule 26(f)
23 Report, complete initial disclosures or state objection in Rule 26(f) Report, and file a Case
24 Management Statement.

25 On December 2, 2009, Defendants Swish Marketing, Inc., Matthew Patterson, and
26 Jason Strober filed a motion to strike certain portions of the FTC's Complaint. (Dkt. #34.)
27 On December 8, 2009, Defendant Mark Benning filed a motion to dismiss the Complaint,
28 pursuant to Rules 8 and 9 of the Federal Rules of Civil Procedure. (Dkt. #41.) On December

22, 2009, the Court entered an order (Dkt. #46) that sets February 10, 2010, as the date on which it will hear argument on these motions, and sets March 31, 2010, as the new date for the Case Management Conference.

III. PROPOSED REVISED SCHEDULE

So that the parties can prepare their initial disclosures, discovery plan, and Case Management Statement after the Court has ruled on the defendants' pending motions regarding the Complaint and after the defendants have filed their answers to the Complaint, the parties propose the following modifications to the initial schedule for this case:

Current Date	Proposed Date	Event
1/21/2010, pursuant to Order Setting Initial Schedule (Dkt. #27)	3/10/2010	Last day to: • meet and confer re: initial disclosures, early settlement, and discovery plan
2/04/2010, pursuant to Order Setting Initial Schedule (Dkt. #27)	3/24/2010	Last day to: • file Rule 26(f) Report, complete initial disclosures or state objection in Rule 26(f) Report, and file Case Management Statement

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IV. CONCLUSION

The parties respectfully request that the Court revise the initial schedule as set forth above.

Respectfully submitted,

DATED: January 20, 2010 /s/ Lisa D. Rosenthal

LISA D. ROSENTHAL
KERRY O'BRIEN
EVAN ROSE

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

(The filer attests that concurrence in the filing of this document has been obtained from each of the other signatories.)

DATED: January 20, 2010 /s/ Michael A. Thurman

MICHAEL L. MALLOW
MICHAEL A. THURMAN
LOEB & LOEB LLP

Attorneys for Defendants
SWISH MARKETING, INC. and
MATTHEW PATTERSON

DATED: January 20, 2010 /s/ Brian Grossman

BRIAN GROSSMAN
TESSER & RUTTENBERG

Attorneys for Defendants
SWISH MARKETING, INC.,
MATTHEW PATTERSON, and
JASON STROBER

DATED: January 20, 2010 /s/ Linda L. Northrup

LINDA L. NORTHRUP
NORTHRUP SCHLUETER, APLC

Attorney for Defendant
JASON STROBER

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2
3
4 /s/ Daniel J. Bergeson
5 DATED: January 20, 2010

6 DANIEL J. BERGESON
7 ELIZABETH D. LEAR
8 DONALD P. GAGLIARDI
9 BERGESON, LLP

10 Attorneys for Defendant
11 MARK BENNING

12 PURSUANT TO STIPULATION, IT IS SO ORDERED:

13 DATED: 01/20/2010

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15 RICHARD SEEBORG
16 UNITED STATES DISTRICT JUDGE
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DECLARATION OF BRIAN M. GROSSMAN

I, BRIAN M. GROSSMAN, Declare as follows:

1. I am an attorney at law, duly licensed and admitted to practice before the United States District Court for the Northern District of California. I am an attorney with Tesser & Ruttenberg, co-counsel of record for defendants Swish Marketing, Inc., Matthew Patterson and Jason Strober in the above-captioned action. I make this Declaration in support of the foregoing Stipulated Motion to Revise Initial Schedule. I have personal knowledge of each of the following facts, and would and could competently testify thereto if called upon to do so in a court of law.

2. **Reasons for the requested enlargement of time (Local Rule 6-2(1)):** The current deadlines to meet and confer regarding initial disclosures and discovery, and to complete initial disclosures and to file a Case Management Statement will take place before the Court makes a determination regarding the Motion to Strike filed by defendants Swish Marketing, Inc., Matthew Patterson and Jason Strober, as well as the Motion to Dismiss filed by defendant Mark Benning. The parties believe that it will be difficult to comply with these initial deadlines before learning how the Court will rule on the defendants' motions and before the defendants submit their answers to the Complaint. Thus, the parties respectfully request that these initial deadlines be extended, to be in line with the Initial Case Management Conference set for March 31, 2010.

3. **Disclosure of all previous time modifications (Local Rule 6-2(2)):** The FTC filed its Complaint (Dkt. #1) in this matter on August 19, 2009. On the same day, the Court issued its Order Setting Initial Case Management Conference and ADR Deadlines (Dkt. #4), which set November 25, 2009, as the deadline for the parties to meet and confer about initial disclosures, early settlement, and a discovery plan, and to reach an agreement regarding ADR; December 9, 2009, as the deadline for the parties to file the Rule 26(f) Report, complete initial disclosures, and file a Case Management Statement; and December 16, 2009, as the date for the Initial Case Management Conference.

1 4. Defendants' initial deadline to respond to the Complaint was October 19, 2009.
2 On October 8, 2009, the parties agreed to extend that deadline until November 19, 2009.
3 (Dkt. #17.) On November 4, 2009, Defendants filed a Motion to Enlarge Time to Respond
4 to the Complaint [L.R. 6-1(B) and 6-3] (Dkt. #19), which the FTC opposed (Dkt. #20).
5 Defendants' motion sought to enlarge the deadline for responding to the FTC Complaint until
6 three weeks after the D.C. District Court ruled on a pending motion filed by the FTC to
7 dismiss an action for declaratory relief that certain defendants had filed in that court against
8 the FTC.

9 5. The week of November 9, 2009, the Court issued two orders (Dkt. #22, 24) in
10 which it temporarily postponed the deadlines set forth in the August 19, 2009, Order Setting
11 Initial Case Management Conference and ADR Deadlines, except for those related to ADR,
12 and the deadline to respond to the Complaint; set a schedule for further briefing on whether
13 this action should be delayed pending developments in the D.C. Action; and scheduled a
14 hearing date of December 16, 2009. On November 17, 2009, the D.C. District Court
15 dismissed the D.C. Action. Pursuant to a joint motion of the parties (Dkt. #25), on November
16 23, 2009, the Court entered an Order Setting Initial Schedule (Dkt. #27), which among other
17 deadlines, set January 21, 2010, as the last day to meet and confer regarding initial
18 disclosures, early settlement, and discovery plan, and February 4, 2010, as the last day to file
19 the Rule 26(f) Report, complete initial disclosures or state objection in Rule 26(f) Report, and
20 file a Case Management Statement.

21 6. **Description of the effect the requested time modification would have on the**
22 **schedule for the case (Local Rule 6-2(3)):** Insofar as the Court has already continued the
23 Initial Case Management Conference from February 10, 2010 to March 31, 2010, and insofar
24 as the parties propose to extend the initial deadlines in line with the aforementioned

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1 extension of the Initial Case Management Conference, the parties do not believe that the
2 requested time modification will have an effect on the schedule for the case.

3 I declare under penalty of perjury under the laws of the United States of America that
4 the foregoing is true and correct, and that this Declaration was executed on January 20, 2010,
5 at Los Angeles, California.

6
7 /s/ Brian M. Grossman

8

BRIAN M. GROSSMAN